

2013 MAY 14 PM 11  
U.S. DISTRICT COURT  
NORTHERN DISTRICT OF OHIO  
CLEVELAND

**UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF OHIO**

ZOYA COMPANY et al

Plaintiffs,

vs.

NIOS, INC.

Defendant.

Case No. 1:13cv780

**Affidavit of Dr. Joshua Gordon  
In support of Rule 12(b) Motion**

I, Joshua Gordon, being sworn/affirmed on oath, state that:

1. I am the sole founder, owner, and CEO of Nios, Inc. a New York corporation with a business address at 315 W. 57th Street Suite 308, New York, NY 10019 (referred to as "Nios").
2. On June 4, 2012 Nios submitted a trademark application to the US Patent and Trademark Office (US Serial Number 85642689) for the trademark "NOYA" for use in conjunction with the sale of cosmetics.
3. The above-referenced NOYA application lists the following goods in

International Class 03:

*Body and beauty care cosmetics; Cosmetic creams for skin care; Cosmetic hand creams; Cosmetic nourishing creams; Cosmetic preparations for body care; Cosmetic preparations for skin care; Cosmetics and make-up; Cosmetics, namely, lip repairers; Lip balm; Lip cream; Lip gloss; Lip gloss palette; Lip liner; Lipstick; Lotions for cosmetic purposes; Non-medicated balms for use on lips; Skin conditioning creams for cosmetic purposes.*

4. On October 10, 2012 the US Patent and Trademark Office, having determined that *no* likelihood of confusion with ZOYA or any other registered trademark exists, proceeded to approve the NOYA mark and submitted its Notice of Publication.

5. NOYA lip balm products have been sold in stores beginning since November 2012, and no other products have been sold under NOYA's brand thus far other than lip balms.

6. To date, NOYA products have been sold in roughly 150 stores in the State of New York, 19 stores in the State of New Jersey, 2 stores in Chicago, and 0 stores in the State of Ohio.

7. I estimate that 87% percent of Nios revenue occurred in the State of New York, 11% in the State of New Jersey, 1% in Chicago, less than 1% in other states, while only 0.0004% of Nios' revenue occurred from sales to the State of Ohio.

8. I further estimate that over 99% of NOYA products are sold in brick-and-mortar stores, and that less than 1% are sold online.

9. The estimated less than 1% online sales may have occurred either on NOYA's online portal or with other retailers who may have acquired NOYA products.

10. Nios has never:

- a. Maintained an office in the State of Ohio,
- b. Owed or paid taxes in the State of Ohio,
- c. Maintained any bank accounts in the State of Ohio,
- d. Signed or negotiated any transactions in the State of Ohio,
- e. Contracted any services in the State of Ohio,
- f. Owned, leased or rented property in the State of Ohio,
- g. Maintained a telephone listing in Ohio,
- h. Sold its products in any physical retail location in the State of Ohio,
- i. Utilized any registered agents in the State of Ohio,
- j. Hired any employees in the State of Ohio,
- k. Engaged in any kind of persistent course of conduct in the State of Ohio
- l. Dispatched any sales representatives into Ohio, or
- m. Conducted print, television, or radio advertising that was directed to the State of Ohio

11. The sole transaction from the [noyabeauty.com](http://noyabeauty.com) website that has occurred in the State of Ohio is a single sale in the amount of \$15.96, occurring after settlement discussions between the parties broke down, and only a short time before Plaintiff filed its Complaint in this matter.

12. At all times since launching its website, Nios has maintained the following

language on its website Terms and Conditions page at <http://noyabeauty.com/terms-and-conditions/>:

***Applicable law***

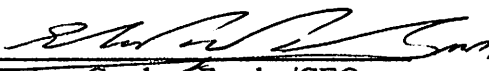
*By visiting NOYA, you agree that the laws of the state of New York, USA, without regard to principles of conflict of laws, will govern these Conditions of Use and any dispute of any sort that might arise between you and NOYA or its associates.*

***Disputes***

*Any dispute relating in any way to your visit to NOYA or to products you purchase through NOYA shall be submitted to confidential arbitration in New York, USA, except that, to the extent you have in any manner violated or threatened to violate NOYA's intellectual property rights, NOYA may seek injunctive or other appropriate relief in any state or federal court in the state of New York, USA, and you consent to exclusive jurisdiction and venue in such courts. ... "*

13. At all times since launching its website, a prominently displayed "Terms and Conditions" link, which leads directly to the Nios' Terms and Conditions page, has appeared at the bottom of every website page.

Respectfully Submitted,

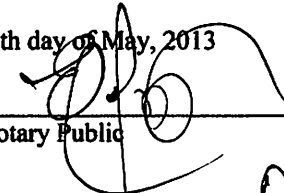
  
Dr. Joshua Gordon, Fonder/CEO  
Nios, Inc.

**OATH**

I, Joshua Gordon, swear or affirm that I have read this document and, to the best of my knowledge and belief, the facts and information stated in this document are true, accurate and complete. I understand that if I do not tell the truth, I may be subject to penalties for perjury.

  
\_\_\_\_\_  
Joshua Gordon

Sworn before me and signed in my presence this 10th day of May, 2013

  
\_\_\_\_\_  
Notary Public

**EDITA M. NUÑEZ**  
Notary Public, State of New York  
No. 01NU6135292  
Qualified in New York County  
Commission Expires Oct. 17, 2013

My Commission Expires: Oct 17 2013